IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3344 OF 2006

Shantaben Dhirajlal Shah
and ors. ...Petitioners

Versus

Mayashankar Vrajlal Desai
and Ors. ....Respondents

Mr.P.S.Dani for the petitioners.

Shekhar Shetye with Viral Amin and Ashish Mushra i/by.Amin & Co. for respondent nos.2 to 6,8 and 9.

CORAM: S.C.DHARMADHIKARI, J.

29th November, 2007

P.C. :

1. Heard Learned Counsel appearing for the parties.

2. Perused the petition and the annexures thereto

including the application which is preferred by the petitioners/original plaintiffs for impleading the two persons whose names are enlisted therein, Dr. Sanjay Ramniklal Desai and Smt. Rupal Harish Ghai as party defendants to the suit.

3. At the outset, Mr.Shetye appearing for the respondents, makes a statement that Rupal H.Ghai is not residing in the suit premises and she is not claiming any right in respect of the same. In such circumstances, Mr.Dani states that the petitioner does not press their application for joinder in the Trial Court, insofar as Rupal H. Ghai is concerned.

4. In sofar as Dr. Sanjay Ramniklal Desai is concerned, the observation of the Trial Court appears to be that he was the heir of Ramniklal Mahashankar Desai. The said Ramniklal was impleaded by the petitioners as the heir of the original/deceased tenant. Dr.Ramniklal Desai had expired and the petitioners were informed about the death of Ramniklal on 30.1.1995, by a communication of 26.6.1999. It appears that an application was made for restoration of

the suit which came to be dismissed on 20.7.2001. Although that application was allowed, the trial court observed that no steps have been taken to bring the heirs and legal representatives of Ramniklal Desai on record within the period of limitation and hence the suit stands dismissed as abated against Ramniklal Desai.

5. Mr.Dani, submits that, insofar as these observations are concerned, they would not constitute a bar for impleadment of Dr.Sanjay Ramniklal Desai as a party defendant to the suit in his individual capacity. It is Mr.Dani's submission that nowhere the said Sanjay Ramniklal Desai says that he does not claim any right in the property. Infact he is in possession thereof. Mr.Dani, invites my attention to the Affidavit-in-reply filed on behalf of the Defendant Nos.2 to 6 to interim Notice No.1415 of 2005, copy of which is at Annexure-E and submits that Dr.Sanjay Desai is the constituted attorney of Defendant Nos.2 to 6. In such circumstances, to avoid multiplicity of proceedings and to have effective and complete adjudication of the controversy in the suit so also considering the fact

that the suit is of 1982, the joinder ought to have been permitted.

6. Mr.Shetye, on the other hand, supports the impugned order and further contends that false statements have been made before the Trial Court so also this court and therefore the discretionary and equitable jurisdiction under Article 227 of the Constitution of India should not be exercised in favour of the present petitioners.

7. I have perused the subject application and the Affidavit-in-reply so also the impugned order. What seems to have weighed with the Learned Judge is that the suit is part-heard. When the suit is part-heard, now an application is made and therefore such belated application should not be entertained as the petitioners are negligent. Secondly, earlier order of abatement is unchallenged and therefore impleadment of
Dr. Sanjay Desai would affect adversely the defence of the present respondents- original Defendants.

8. To my mind, both reasons are unsustainable. If there is a delay in making the application, then interest of justice demands that the application should have been allowed by imposing costs. If the other reason is that the suit has abated against the deceased/defendant no.1 and the defence in that behalf is going to be adversely affected, then, that aspect could have been taken care of by the court below by keeping open all pleas and issuing appropriate clarifications. Beyond, these two reasons I see nothing else in the impugned order which makes the application of the present petitioners not maintainable. On the other hand, the Learned Judge does not dispute the fact that Dr.Sanjay Desai is in possession of the suit premises. That Dr.Sanjay Desai independent of the deceased defendant no.1 continues to represent defendant nos.2 to 6 as their constituted attorney and that nowhere it is denied by him by filing an Affidavit personally that he does not claim any interest in the property is clear. On the other hand, the Affdiavit-in-reply filed to the Interim Notice goes to assert that valuable rights have accrued in favour of the defendants including Dr.Sanjay Desai. Sanjay

Desai could have contested the application as respondent. He files nothing on record to controvert the contents of the interim notice. Further, one of the purpose for joinder of parties is to avoid multiplicity of proceedings and to pass a complete and effective decree. Once the controversy before the court in respect of the premises is pending since 1982, then, in the peculiar facts of this case interest of justice demanded that the application should have been allowed.

9. Accordingly, I find that the impugned order suffers from an error apparent as the learned Judge has failed to apply his mind to the basic and fundamental principles which go into deciding an application of the present nature. The order is therefore patently unsustainable in law. Interim Notice No. 1415 of 2005 is granted. The request of the petitioners to join Dr.Sanjay Ramniklal Desai as party defendant to the suit is allowed. The petitioners/plaintiffs are permitted to amend the plaint accordingly. However, the petitioners/plaintiffs to pay costs quantified at Rs.7500/- to be paid within a period of two weeks from

today. If the costs are tendered and proof is produced, the Trial Court to permit amendment of the plaint. Amended plaint to be served on Sanjay Desai and other defendants. Written Statement/Additional Written statement to be filed within a period of four weeks from the date of receipt of the amended plaint.

10. It is clarified that the controversy on merits is not going to be affected by the joinder of Dr.Sanjay Desai and all submissions, contentions and pleas in that behalf of both sides are expressly kept open. Merely because Dr. Sanjay Desai has been directed to be impleaded as party defendant does not mean that the defendants cannot urge that the suit stands abated after the death of Ramniklal Desai. That aspect is untouched and unaffected by the observations made in this order and the Trial Court to decide the suit taking into account all pleas in the written statement. Equally, it would be open for Dr. Sanjay Desai to urge that the suit having abated against Ramniklal Desai, no relief can be claimed against him as well.

. Petition Allowed in the above terms. No

costs.

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